The Rules of the Game: "Play In The Joints" Between the Religion Clauses

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In law, as in life, there is a good deal of ambivalence about playing. Play, as the portal to innovation and creativity, can be the enemy of settled expectations and predictability. In the recent case of *Locke v. Davey*,[1] Justice Rehnquist, writing for the majority, appealed to "play in the joints" metaphor famously used in *Walz v. Tax Commission of N.Y.*[2] as an aid in constitutional balancing of apparently competing constitutional religion clause claims, saying:

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[1] 72 U.S.L.W. 4206, 124 S.Ct. 1307 (2004)

[2]

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will

> These two clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. Yet we have long said that 'there is room for play in the joints' between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.[3]

One of the more important tasks of law is to define and defend the expectations we loosely call rights,[4] consequently it is unsettling to find "play" as an operant feature of a legal rule describing the interaction of two important constitutional clauses -- the clause

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> not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Walz v. Tax Comm'n of the City of N.Y., 397 U.S. 664, 669 (1970).

[3] 72 U.S.L.W. at ___; 124 S.Ct at 1313

[4] I say "loosely-called rights" not because I will be contending that the term is very vague, but because one could coherently take a position that the expectations discussed in this article, particularly those in the discussion regarding conditioned benefits at section III *infra*, do not rise to the level of right but are more properly viewed as "expectations" or "privileges." These arguments will be addressed in the aforementioned section. Suffice it to say, for the purposes of the introduction that it will be contended in that section that the consequences of such disappointed expectations need not rise to the level of right to have legal consequences in this instance.

prohibiting the establishment of religion and the clause guaranteeing rights to the free exercise of religion.

Specifically, in the *Locke* case, the "play" arose when a governmental disbursement that benefited a religious institution passed muster under the establishment clause because of the intervention of a private choice by an individual. Such sanitizing choices are a key determinant for a line of establishment clause cases, most recently *Zelman v. Simmons-Harris,*[5] that found government disbursements to religious organizations via such choices constitutional. Hereinafter such choice mechanisms will be termed "*Zelman* choices" for convenience.

I will argue in this article that *Locke* is an exemplar of the new generation of Establishment clause cases that have written into law a sort of safe harbor, private choice, for governmental benefits that find their way into

[5] 536 U.S. 639 (2002)